IN THE

Supreme Court of the United States.

October Term, 1902.

THE UNITED STATES, Appellants,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove.*
} No. 24.

THE OFFICERS AND ENLISTED MEN OF THE U. S. S. *New York*, U. S. S. *Indiana*, AND U. S. S. *Wilmington*,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove.*
} No. 34.

BRIEF AND ARGUMENT ON BEHALF OF THE U. S. S. *WILMINGTON.*

This case is very fully stated in the brief on behalf of the U. S. S. *Indiana*. The *Wilmington* presents a claim as one of the vessels entitled to share in the prize. The facts in regard to this vessel's participation are stated by the commanding officer of the vessel, Commander Chapman C. Todd, now rear-admiral, United States Navy, retired, as follows (Rec. 46, Q. 3):

"About 5 P. M. April 25th, 1898, while on blockade duty off Havana, Cuba, the steamer *Panama* was sighted by this vessel and reported by signal to the flagship *New York*, not as the *Panama*, but as a strange steamer. One hour later the *Indiana* was signalled to go in chase. The *Wilmington* was one mile nearer the steamer than the *New York*. At dark a search light was observed to the nd. and ed. showing steadily for an unusual length of time. The *Wilmington* stood for it when near enough the light was found to be from the *Mangrove*, it being thrown upon the *Panama*. The *Mangrove* was sole custodian of the *Panama*. The *Mangrove* was hailed and asked if the *Wilmington* had not better ac'ompany the prize to the flagship, which service was gratefully accepted. In addition to the above, the *Panama* being much superior in size, armament, and speed to the *Mangrove*, the night being very dark, it was possible for the *Panama* to make her escape, until the presence of the *Wilmington* made the seizure final and secure. It is therefore claimed that the *Wilmington* did assist in her capture and that the officers and crew are entitled to a share in the prize."

Upon this condition of fact the court below decided against the *Wilmington* (Rec. 58).

The *Wilmington* has presented no evidence in addition to that found in the record below and submits this case upon that evidence. This consists of the above evidence of her commanding officer and that of Lieutenants Bailey and Almy (Rec. 46–48) and the statements of the master, Quevedo (Rec. 14, Q. 3), the supercargo, Burgas (Rec. 7, Q. 3), and the engineer, Thompson (Rec. 10, Q. 3), that the *Wilmington* was in sight at the time of the capture.

It is certain that the *Wilmington* was nearer the prize than the *New York* and should the *New York* be admitted to share, the *Wilmington* must also be admitted.

GEORGE A. KING,
WILLIAM B. KING,
Proctors for the U. S. S. *Wilmington*.

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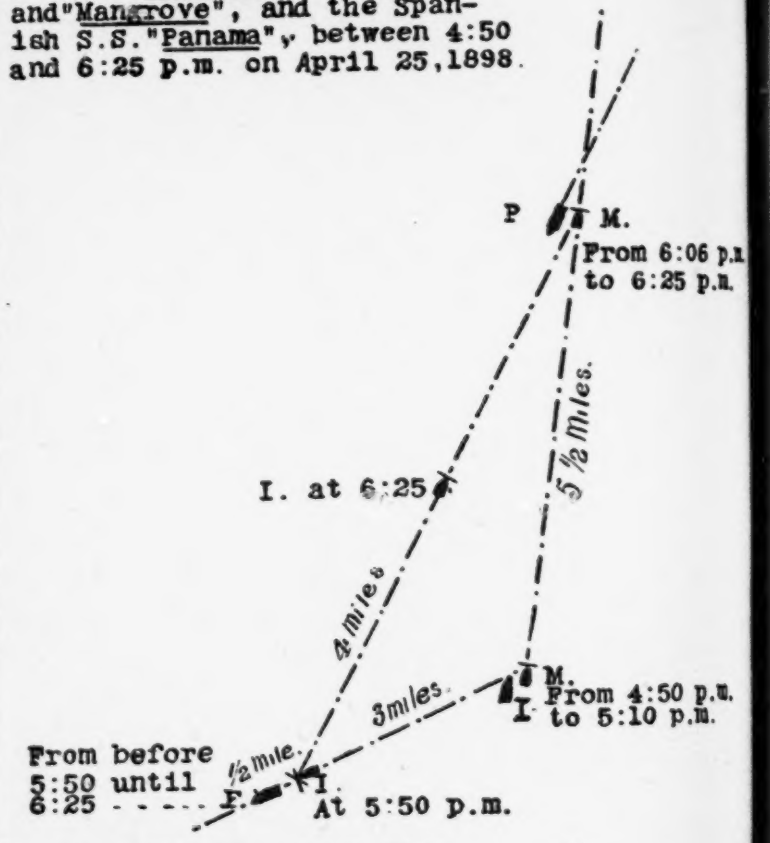
Positions occupied by the U.S.S. "New York", "Indiana" and "Mangrove", and the Spanish S.S. "Panama", between 4:50 and 6:25 p.m. on April 25, 1898.



Scale 1/2 inch to 1 mile.

F. "New York."
I. "Indiana"
M. "Mangrove"
P. "Panama."

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES,
Appellant,
vs.
THE OFFICERS AND CREW OF THE U. S. S. "MANGROVE." } No. 24.

THE OFFICERS AND ENLISTED MEN OF THE U. S. SHIPS "NEW YORK," "INDIANA" AND "WILMINGTON,"
Appellants,
vs.
THE OFFICERS AND CREW OF THE U. S. "MANGROVE." } No. 34.

Appeal from the District Court of the United States for the Southern District of Florida.

Brief for the Officers and Enlisted Men of the U. S. S. "New York," Appellants.

Statement of the Case.

These appeals run from a decree of distribution in prize, whereby the court below adjudged and ordered that the U. S. S. "*Mangrove*" was the sole captor of the Spanish steamer

"*Panama*," that no other vessels of the United States were entitled to share in the prize, and that the "*Panama*" being of equal or superior force, the officers and men of the "*Mangrove*" were entitled to the whole of the net proceeds of the prize (*Rec., p. 59*). The United States appeals from this decree (*No. 24*), contending that it is entitled to a moiety of the proceeds: (1) because the "*Mangrove*" constituted a force superior to the prize, and (2) because other vessels of the United States Navy, which participated in the capture, together with the "*Mangrove*," constituted a force superior to the prize (*Id., pp. 59, 60*). The officers and men of the U. S. S. "*New York*," "*Indiana*" and "*Wilmington*," appeal (*No. 34*), contending that they are entitled to share in the prize (1) because their respective vessels participated in the capture, and (2) because they were within signal distance of the "*Mangrove*" at the time of the capture, under such circumstances and in such condition as to have been able to render effective aid, if required (*pp. 62–64*). The "*Panama*" was captured on April 25, 1898, and at once sent in for adjudication by order of Rear-Admiral Sampson. In accordance with law (*R. S. U. S., § 4616*), claims for shares in the prize were presented by the "*New York*," "*Indiana*," "*Mangrove*" and "*Wilmington*" (*pp. 19–21; 35–37; 44–46; 48–49*). Depositions, taken on behalf of these vessels, were filed with the prize commissioner (*pp. 22–35; 38–48; 51–52; 69–75*), who made his report, finding that the "*Mangrove*" was the sole captor, and that the "*Panama*" was of equal or superior force (*pp. 52–53*). Objections were noted on behalf of the "*New York*," "*Indiana*," and "*Wilmington*." The cause was heard upon the report, objections, and evidence and thereupon the decree of distribution heretofore mentioned was entered. After appeals had been taken, this court on motion of the appellants ordered further proofs, which have been taken (*See Additional Evidence*).

Specifications of Error.

The errors of the district court assigned by the appellants and intended to be argued are these:

(1) The court erred in deciding that the "*Mangrove*" was the sole captor of the "*Panama.*"

(2) The court erred in deciding that the "*Mangrove*" was the sole vessel entitled to participate in the distribution of the proceeds of the "*Panama.*"

(3) The court erred in failing and declining to hold that the U. S. S. "*New York,*" "*Indiana,*" and "*Wilmington,*" or any of them, were joint captors with the "*Mangrove*" of the "*Panama.*"

(4) The court erred in failing and declining to hold that the "*New York,*" "*Indiana,*" and "*Wilmington*" or any of them, were in signal distance of the "*Mangrove*" at the time of the capture of the "*Panama*" under such circumstances and in such conditions as to be able to render effective aid, if required.

(5) The court erred in failing and declining to hold that the U. S. S. "*New York,*" "*Indiana*" and "*Wilmington,*" or any of them, were entitled to share in the proceeds of the "*Panama.*"

Argument.

Before proceeding to review the facts, we invite attention to the statute, which governs the admission of naval vessels to share in prizes, and to the authorities which deal with the question of participation in captures. These will show what facts are material.

Sec. *4632 R. S. U. S.* (*Act of June 30, 1864*) reads:

> All vessels of the Navy, within signal distance of the vessel or vessels making the capture, under such circumstances, and in such condition as to be able to render effective aid, if required, shall share in the prize * * *.

In the case of the "*Atlanta*" (*3 Wall., 425*) there arose a question as to what constituted participation in a capture. It appeared that the U. S. S. "*Weehawken*" and "*Nahant,*" both monitors, while within a thousand yards of one another, were attacked by the Confederate ram "*Atlanta.*" The "*Atlanta's*" fire was directed at the "*Nahant,*" alone. The "*Weehawken*" fired upon the "*Atlanta,*" inflicting damage, so serious that she surrendered immediately, and before the "*Nahant*" had fired a shot. The "*Weehawken*" claimed that she should be regarded as the sole capturing vessel and that the entire proceeds of the prize should be awarded to the captors. The district court held that the "*Nahant*" was to be considered a part of the capturing force, and that as the two monitors, together, made a force superior to that of the "*Atlanta,*" the United States was entitled to receive a moiety of the prize money. On appeal by the captors it was said:

> The mere fact that the only shot fired, and the only damage done was by the "*Weehawken*" is not decisive Other circumstances must be taken into account in determining the matter—such as the force, position, conduct and intention of the "*Nahant.*" The two vessels were known to be under the same command and of nearly equal force. The "*Atlanta*" descended the sound to attack both and governed herself with reference to their combined action. It is not reasonable to suppose that her course would have been the one pursued had she only the "*Weehawken*" to encounter. Besides, the fire of the "*Atlanta*" was directed entirely to the "*Nahant*" and of course diverted from her consort. It is possible that a different result might have followed had the fire been turned upon the "*Weehawken.*" This diversion must be considered in every just sense of the term as giving aid to her. Again the power of the shot of the "*Weehawken*" had evidently surprised the officers of the "*Atlanta,*" who found their vessel speedily disabled and their crew demoralized. The advance upon her at full speed of a second monitor of equal force, ready to inflict similar

injuries, may have hastened the surrender. It can hardly be supposed that the approach of the second monitor did not enter into the consideration of the captain and officers of the "*Atlanta.*" If the shot from the guns of one of the monitors could, in a few moments, penetrate the casemate of the "*Atlanta,*" crush in the bars of her pilot house and prostrate between forty and fifty of her men, her captain might well conclude that the combined fire of both would speedily sink his vessel and destroy his entire crew. It cannot be affirmed nor is it reasonable to suppose that any of the incidents of the battle would have occurred as they did if the "*Nahant*" had not been present in the action. We concur, therefore, in the view of the learned district judge, that in the comparison of forces engaged in the conflict the "*Nahant*" must be included with the "*Weehawken.*"

The purport of this is that a vessel which has taken no potential part in a capture, shall nevertheless be treated as a joint captor, if her presence at or near the scene of action were a contributing cause of the surrender of the prize.

Our review of the facts will be confined, as far as possible, to such as tend to establish the position of the "*New York,*" with reference to that of the "*Mangrove*" at the time of the capture, but this of necessity will involve the location of the "*Indiana.*" There is considerable conflict in the testimony of witnesses produced on behalf of the several claimant vessels. Especially is this true of estimates made of the distances which intervened between the vessels, the time when certain incidents transpired and the rates of speed developed by the vessels. The following facts appear to be established by a preponderance of testimony and by other evidence in the case:

On April 25, 1898, an American fleet, of which the vessels in question formed part, was blockading Havana and other Cuban ports. They were a little to the eastward of Havana and at various distances from the Cuban coast.

The blockade was not a close one, like that of Santiago. The blockading vessels cruised slowly back and forth over a considerable area and kept no record of their distances from shore. The "*New York*" was an armored cruiser of the first class, and by far the fastest vessel of the fleet (pp. 52, 70, *Ad. Ev.*, pp. 100). At the time she was capable of making from fourteen to sixteen knots an hour (*Ad. Ev., p. 100*). The "*Indiana*" was slow, but one of the most powerful battleships afloat (*Ad. Ev., p. 59*). The "*Wilmington*" was a small gunboat of moderate speed. The "*Mangrove*" had been a lighthouse tender, but had been equipped with a light battery. She was small and slow.

About five minutes past six o'clock in the afternoon the "*Mangrove*," then being within hailing distance, or less than one hundred yards of the "*Panama*," ordered the latter to stop, and she did so. Prior to that the "*Mangrove*" had fired shots across the "*Panama's*" bow, but she had not stopped. A boarding officer was sent by the "*Mangrove*" to the "*Panama*" at seven minutes past six and boarded her a few minutes later. Almost immediately he reported to Captain Everett, commanding the "*Mangrove*," that the vessel was the Spanish steamer "*Panama*." After an interval of about fifteen minutes, which, presumably, was consumed in examining the "*Panama's*" papers and completing the capture, the "*Mangrove*" and the prize started toward the other vessels of the United States fleet. At 6.45 the "*Indiana*" fired a shot across the "*Panama's*" bows. The latter lowered her flag at once and a prize crew from the "*Indiana*" was sent on board (pp. 20–35 [*Mangrove*]; 35–44 [*Indiana*]; 48–49, 51–52, 69–73 [*New York*]). It is safe to assume that the capture of the "*Panama*," if the placing of one officer on board of her constituted a capture, did not become a completed fact until between twenty and twenty-five minutes past six o'clock. Most of the witnesses examined give estimates of the distance

which then intervened between the "*Indiana*" and "*Mangrove.*" These range all the way from four to fifteen miles, and some witnesses for the "*Mangrove*" go to the extent of saying that the "*Indiana*" and "*New York*" were not in sight at all. Certainly such testimony cannot serve as the basis of a decision if more reliable evidence be procurable. We believe that a correct result can be deduced from logs of the claimant vessels and uncontradicted statements which show the positions occupied by the various vessels earlier in the afternoon and what each vessel did up to the time of capture.

Between four and five o'clock the "*Mangrove*" coming from the flagship ("*New York*"), brought mail for the "*Indiana*" which she delivered. Among other things this contained an order from the admiral, directing the "*Indiana*" to proceed to Key West with the "*Mangrove*" and another vessel, on special duty. Shortly before five o'clock the "*Indiana*" and "*Mangrove*" approached one another, within hailing distance and their commanding officers communicated by means of megaphones. About ten minutes past five, Captain Taylor of the "*Indiana*" ordered the "*Mangrove*" to proceed on her way to Key West, which she did, taking a course very slightly east of north. The maximum speeed of which she was capable was about eight knots (*Ad. Ev., pp. 59, 100*). Her mission at Key West was not urgent and taking into consideration the fact that it requires such a vessel about five minutes to gain headway, the likelihood is that during the interval of fifty-five minutes after leaving the "*Indiana*" she made an average speed of about six knots an hour. About half-past five the "*Mangrove*" made out a strange vessel to the northeastward, which proved to be the "*Panama.*" The latter headed directly toward her. There was no chase whatever. If the "*Mangrove*" changed her course, at all, it was very slightly and but a few minutes before 6.05 when she first called

upon the "*Panama*" to stop and stopped herself. She lay where she had stopped until 6.25. At the time of the capture she was about five and one-half miles to the northward of the position occupied by her when she left the "*Indiana.*" When the "*Mangrove*" started for Key West at ten minutes past five the "*Indiana*" got under way, an operation which, for so heavy a vessel, required from ten to twelve minutes. She took a southwesterly course towards the "*New York,*" wishing to communicate with the latter by signal. She proceeded very slowly—probably at less than six knots an hour. Almost immediately after starting, or about 5.25, she hoisted a signal. It appears from the signal logs of the "*New York*" and "*Indiana*" that at 5.38 the "*New York*" signaled the "*Indiana*": "*What is the character of the strange vessel bearing east?*" The "*Indiana*" replied: "*Merchant Steamer.*" At 5.47 the "*New York*" signaled "*What flag is stranger flying?*" At 5.50 the "*Indiana*" replied: "*Cannot see.*" Interpreting the last signal from the "*New York*" to be an order for her to get the information asked, the "*Indiana*" turned to the northward and proceeded in the direction of the "*Mangrove.*" In the thirty minutes during which she held her southwesterly course, she had covered not more than three miles. At 6.05 the "*Indiana*" signaled to the "*New York*": "*Strange vessel changed course east,*" and again at 6.06: "'*Mangrove*' *near strange steamer.*" The last signal was made by wigwag, which is the system employed when vessels are close together, or somewhere between hailing distance and a distance at which regular flag or hoist signals would be required. When at 6.06 the wigwag signal was made by the "*Indiana*" she and the "*New York*" were probably within less than a mile of each other (*pp. 52, 70, Ad. Ev., p. 98*). The two vessels had been still closer to one another, but betwen 5.50 and 6.06 the "*Indiana*" had had

time to turn and proceed a short distance on her northerly course. After getting well under way in the direction of the "*Panama*," the "*Indiana*" made the best of speed of which she was capable. She was not capable of making more than eight or nine knots an hour (*Ad. Ev., pp. 59–60*). On her trial trip with engines and boilers in perfect condition, her bottom perfectly clean and using force draught, she had developed a speed of fifteen knots an hour, but, at the time in question, her bottom was very foul, her boilers and engines were much in need of repair, and her officers had to be extremely cautious not to strain them, lest she should break down and be unable to serve throughout the campaign. It is safe to say that between 5.50 when she turned toward the "*Panama*" and 6.25 the time of the capture, she covered not more than four miles on her northerly course. Taking into consideration the fact that the "*Mangrove*" and "*Indiana*" did not proceed in opposite directions when they parted company, but took courses which made an angle of about 135° with each other, it is clear that at 6.20 the "*Indiana*" was over a mile nearer the "*Mangrove*" than she would have been had she remained where she was when she and the "*Mangrove*" parted company at 5.10. Now we have seen that at 6.25 the "*Mangrove*" was about five and one-half miles to the northward, the position occupied by the two vessels at 5.10. Hence the "*Indiana*" was less than four miles distant from the "*Panama*" at the time of the capture. This means that the "*Indiana*" was a participant in the capture, under the rules announced in the case of the "*Atlanta*" (*supra*). It is a fact, well known, that her 13-inch guns had an effective range of more than seven miles. Had the "*Panama*" attempted to avail herself of her superior speed and escaped from the "*Mangrove*," the "*Indiana*" could have sunk her or crippled her to such an extent that her capture would have been assured (*Ad. Ev., p. 60*). It fol-

lows from the above facts that the "*New York*," which was about four miles astern of the "*Indiana*" at the time of capture was within eight miles of the "*Mangrove*." The diagram at the beginning of this brief presents the situation graphically. It appears from the testimony of Captain Chadwick, Ensign Mustin, and Naval Cadet Duncan, who observed the capture from the bridge of the "*New York*," that they saw everything that occurred, and made out clearly not only the "*Mangrove*," with which they were familiar, but likewise the "*Panama*," which was a stranger (*pp. 48–49; 51–52; 69–70*). It is not surprising that the "*Panama's*" colors were not distinguished by the "*New York*" and the "*Indiana*" at 5.50. The stranger was headed straight for them. Her colors were carried on a staff at her stern. The light breeze that prevailed carried them astern, where they were hidden by her smokestack and rigging.

There is evidence tending to show that the presence of the "*New York*" and the "*Indiana*" was a contributing, if not the controlling, cause of the prompt surrender of the "*Panama*." The latter was a mail steamer. She was larger and faster than the "*Mangrove*," and equipped with a more powerful battery. She had sailed from New York on April 20, the day on which the blockade of Havana was established. She knew that war was imminent. On April 25, she had reason to know that if she encountered the blockading fleet in the vicinity of Havana, she would not meet a small steamer like the "*Mangrove*," apart from large and powerful vessels. She maintained a lookout at her masthead, to give her master the earliest notice of the presence of United States ships (*p. 17*). Ramon Burgas, an officer of the "*Panama*," when examined *in preparatorio*, testified (*p. 7*) that at the time of the capture there were two warships in sight, beside the "*Mangrove*." These being to the westward of him, he could not see their hulls,

but did see their turrets. Similar testimony was given by Gasper Thompson, one of the captured crew (*p. 10*); also by Manual Quevedo, the master of the "*Panama*" (*pp. 13–14*). The latter said that he sighted the "*Indiana*" shortly after 5.30 P. M., or about the time he discovered the "*Mangrove.*" Now in view of the "*Panama's*" superiority to the "*Mangrove,*" both in speed and armament, we are forced to adopt the conclusion that she would not have surrendered without resistance, or an attempt to escape, had she not seen that the "*Mangrove*" was supported by larger, faster and more powerful ships, which were ready to take or perhaps sink her, if she did not stop at the "*Mangrove's*" command. The "*New York*" sighted the "*Panama*" at 5.38, or about the same time that she was discovered by the "*Indiana*" and almost as soon as she was sighted by the "*Mangrove.*" Captain Chadwick, Ensign Mustin, and Cadet Duncan noted every incident of the capture. Being at the time within eight miles of the "*Panama,*" the "*New York,*" running at the rate of sixteen knots an hour, could have covered the intervening distance in a half hour, if there had been the slightest need of her assistance, and if the "*Panama*" had escaped from both the "*Mangrove*" and the "*Indiana,*" she could have run down and taken her in little more than an hour (*pp. 49, 52, 70; Ad. Ev., p. 100*). We submit that the "*New York*" as well as the "*Indiana*" is to be considered a participant in the capture (*The* "*Atlanta,*" *supra*).

Aside from the question of actual participation we must consider the right of the "*New York*" to share, as a vessel "within signal distance of the vessel or vessels making the capture" (*R. S. U. S., Sec. 4632, supra*). This requires an understanding of the various systems of signals used in the Navy and the distances at which they can be read. By night the Very system is employed. It consists of lights of various colors produced by the ignition of a package

powder projected into the air from a pistol. The court below admitted a vessel to share in a prize taken at night, without her knowledge and distant from her, more than ten miles (*The "Guido"*—not reported). By day and at considerable distances signals are exchanged by means of flags, which are hoisted on a halyard at one of the ship's masts, the flags being ranged one above the other, with the uppermost one near the masthead. Such a signal, being high above the sea and clear of the ship's rigging and smoke, can be read when the hull of the vessel is not visible. Most witnesses, who testified on the subject, express the opinion that such signals can be read, under favorable circumstances, at a distance of six miles or a little more. At shorter range, usually less than a mile, signals are made by the wigwag system, which as its name indicates, consists of small flags, waved to and fro, from the ship's deck. Under some circumstances signals are exchanged by the discharge of guns. At times this method is effective at great distances, but it is not reliable.

At the time of capture the condition of the light was most favorable for the "*New York*" to observe all objects to the eastward. The sun being near the western horizon, its rays bore directly upon the "*Indiana*," "*Mangrove*" and "*Panama*," and there was no glare to disturb the observer's vision. Looking to the westward, however, or from the "*Mangrove*" or "*Indiana*" toward the "*New York*," the conditions of light were most unfavorable. The observers would have been blinded by the direct rays of the sun. It is even possible that the other ships might not have been able to see the "*New York*," but that fact, if true, would not be material, for both of them knew where the "*New York*" was, and she could have seen their signals calling upon her for assistance if any had been made. The "*New York*" was about

eight miles from the "*Mangrove*"—a long distance for signalling to be sure—but Captain Chadwick explains that by means of a powerful telescope set up on the bridge of the flagship all of the details of the "*Mangrove*" and "*Panama*" could be seen so clearly that he is convinced that signals could have been read at that distance under favorable circumstances (*Ad. Ev., pp. 97–103*). The "*New York.*" was within signal distance of the "*Indiana.*" At 6.06 or less than twenty minutes before the capture the "*Indiana*" had signaled by wigwag: "*Mangrove near strange steamer.*" Granting that she was then two miles distant from the "*New York*" she could not have been much over four miles away at 6.25. We submit that if the presence of the "*New York*" had not been a promoting cause of the surrender, and she a participant in the capture, she would be entitled to share in the prize as having been within signal distances of the "*Mangrove*" and "*Indiana*" which were participants.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for the Officers and Enlisted Men of the U. S. S. "New York."